Supreme Court, U.S.
FILED

041658 JUN 7 2005

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JOHN A. KING, D.O.,

Petitioner,

v.

JACKSON COUNTY HOSPITAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MIKE BOTHWELL
G. MARK SIMPSON
WILLIAM T. PRESCOTT*
BOTHWELL & SIMPSON, P.C.
304 Macy Drive
Roswell, Georgia 30076
(770) 643-1606
Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in dismissing Petitioner's appeal for failure to timely file a notice of appeal, when such notice was filed within the requisite time after entry of a separate judgment under Fed. R. Civ. P. 58 pursuant to this Court's holding in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) that "a party need not file a notice of appeal until a separate judgment has been filed and entered."

LIST OF PARTIES

John A. King, D.O.

Jackson County Hospital Corporation

United States of America

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
1. Dismissal is precluded by binding Supreme Court authority regarding the "separate document" rule	6
2. The panel decision establishes a new Eleventh Circuit rule	10
3. The panel failed to even address the conflict with Supreme Court authority	14
4. The panel opinion creates an inter-circuit conflict	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978).....*passim*

Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999) 12

CBS v. Primetime 24 J.V., 245 F.3d 1217 (11th Cir. 2001) 12

Cooper v. Town of E. Hampton, 83 F.3d 31 (2d Cir. 1996) 8, 15

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)..... 12

Dantzler v. United States IRS, 183 F.3d 1247 (11th Cir. 1999) 13

FOGADE v. ENB Revocable Trust, 263 F.3d 1274 (11th Cir. 2001).....*passim*

Kent v. Baker, 815 F.2d 1395 (11th Cir. 1987) 11, 15

In re Kilgus, 811 F.2d 1112 (7th Cir. 1987) 8, 15

KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)..... 12

Otis v. City of Chicago, 29 F.3d 1159 (7th Cir. 1994)..... 16

Schuurman v. Motor Vessel "Betty K V", 798 F.2d 442 (11th Cir. 1986).....*passim*

Theriot v. ASW Well Service, Inc., 951 F.2d 84 (5th Cir. 1992) 10

United States ex rel. Haycock v. Hughes Aircraft Co., 98 F.3d 11( ) (9th Cir. 1996)..... 4

United States ex rel. Lu v. Ou, 368 F.3d 773 (7th Cir. 2004) 4

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Russell v. Epic Healthcare Management Group, 193 F.3d 304 (5th Cir. 1999) 4

United States v. Hunter, 172 F.3d 1307 (11th Cir. 1999) 13

United States v. Indrelunas, 411 U.S. 216 (1973) ..... *passim*

Virgo v. Riviera Beach Assocs., 30 F.3d 1350 (11th Cir. 1994) 8, 14

STATUTES

28 U.S.C. § 1254(1) 1

31 U.S.C. § 3730 3

FEDERAL RULES

Fed. R. App. P. 4(a)(1)(A) 2, 3

Fed. R. App. P. 4(a)(1)(B) 2, 4

Fed. R. App. P. 4(a)(4) 2

Fed. R. App. P. 4(c) 2

Fed. R. Civ. P. 9(b) 3

Fed. R. Civ. P. 12(b)(6) 3

Fed. R. Civ. P. 50(b) 2

Fed. R. Civ. P. 52(b) 2

Fed. R. Civ. P. 54 2

Fed. R. Civ. P. 54(b) 2

Fed. R. Civ. P. 58 ..... *passim*

Fed. R. Civ. P. 58(a) 1, 6

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 58(a)(2) 2

Fed. R. Civ. P. 59 2

Fed. R. Civ. P. 60 2

OTHER AUTHORITIES

9 J. Moore, Federal Practice P110.08 [2], p. 120 n. 7 (1970) 9

Supreme Court Rule 16(1) 6, 17

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner John A. King, D.O. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is not reported. App. at 22.[1] The order denying rehearing is not reported. App. at 24.

JURISDICTION

This Court has jurisdiction to consider this case by way of a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 58(a) states as follows:

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a

[1] "App." refers to the Appendix to the Petition for a Writ of Certiorari.

separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

Federal Rule of Appellate Procedure 4(a)(1)(A) states that "In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after

the judgment or order appealed from is entered." Federal Rule of Appellate Procedure 4(a)(1)(A) states that "When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."

STATEMENT OF THE CASE

Petitioner John A. King, D.O. ("Relator" or "Petitioner"), filed this *qui tam* action under the False Claims Act on March 17, 1999. The district court had jurisdiction of the action pursuant to 31 U.S.C. § 3730. Following the dismissal of his original complaint, Relator filed a First Amended Complaint ("FAC") on September 2, 2003, asserting claims against Defendant Jackson County Hospital Corporation ("JCH"). On June 1, 2004, the district court entered an order granting JCH's motion to dismiss the FAC. [App. at 1]. The court held that most of Relator's allegations failed to satisfy the particularity requirement of Fed. R. Civ. P. 9(b), and that those allegations that did satisfy Rule 9(b) failed to state a claim under Fed. R. Civ. P. 12(b)(6). The Court allowed Relator 20 days to file an amended complaint. [App. at 19]. Relator elected not to file an amended complaint, and the district court entered an order dismissing Relator's complaint with prejudice on August 26, 2004. [App. at 20]. Judgment was entered in favor of JCH on August 31, 2004, and Relator filed his notice of appeal on September 29, 2004. [App. at 21].

On October 27, 2004, JCH filed a motion to dismiss Relator's appeal in the Eleventh Circuit, asserting that, under *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d

442 (11th Cir. 1986), the notice of appeal was untimely because it was not filed within 30 days after the expiration of the time period to file an amended complaint under the district court's June 1, 2004 order. Relator responded by noting that, under *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) and *United States v. Indrelunas*, 411 U.S. 216 (1973), an appellant need not file a notice of appeal until after the entry of a separate judgment under Fed. R. Civ. P. 58. *See Mallis, supra* at 385 ("a party need not file a notice of appeal until a separate judgment has been filed and entered"). Because Relator's notice of appeal was filed within the required time after the district court's August 31, 2004 judgment, the appeal was timely filed.[2]

On January 10, 2005, a panel of the Eleventh Circuit Court of Appeals dismissed the appeal, holding that Relator's notice of appeal was not timely filed. [App. at 22]. In its one-paragraph order, the panel did not discuss or even refer to the contrary Supreme Court authority cited by Relator, and did not give any reason for its refusal to follow such authority.

On January 31, 2005, Relator timely filed a petition for rehearing en banc, again pointing out the conflict

---

[2] Although it does not affect the outcome of this case, Relator noted below that, because the United States is the real party-in-interest in a False Claims Act case like this one, the applicable time period for filing a notice of appeal is in fact 60 days, as set forth in Fed. R. App. P. 4(a)(1)(B), rather than 30 days. *See United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996). Relator also notes that, in its initial order, the Eleventh Circuit mistakenly referred to the "October 4, 2004" notice of appeal [App. at 22]. As the docket sheet indicates, the notice of appeal was filed on September 29, 2004, and October 4 was simply the date that the clerk made the entry on the docket.

between the panel's decision and the Supreme Court's rulings in *Mallis* and *Indrelunas*, which clearly provide that an appellant need not file a notice of appeal until after the entry of a separate judgment under Fed. R. Civ. P. 58. Relator noted that the panel had failed to make any attempt to distinguish or reconcile its decision with such contrary Supreme Court authority, and also noted that the two Eleventh Circuit cases relied upon by the panel were dicta that did not require dismissal.

On March 10, 2005, the same three-judge panel entered an order denying Relator's petition for rehearing. [App. at 24]. In its one-sentence order, the panel again did not discuss or refer to the contrary Supreme Court authority cited by Relator, and did not give any basis for refusing to follow such authority.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the Eleventh Circuit's decision is directly contrary to unambiguous rulings by this Court in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) ("a party need not file a notice of appeal until a separate judgment has been filed and entered") and *United States v. Indrelunas*, 411 U.S. 216, 220 (1973) (holding that Rule 58 must be "mechanically applied"). Indeed, although such authority was brought to the panel's attention by Relator, the panel did not even *address* such authority in its decision, much less offer any reasons for refusing to apply such authority. Rather, the panel simply *ignored* the conflicting Supreme Court authority in order to reach a result forbidden by such authority. In so doing, the panel has adopted for the Eleventh Circuit a rule that stands in direct contradiction

to binding authority of this Court. Accordingly, this Court should grant certiorari in order to ensure compliance with its unambiguous rulings. Indeed, Relator believes that this is an appropriate case for summary resolution under Supreme Court Rule 16(1) ("The order [on the petition for a writ of certiorari] may be a summary disposition on the merits").

1. Dismissal is precluded by binding Supreme Court authority regarding the "separate document" rule.

Federal Rule of Civil Procedure 58(a) states that "[e]very judgment and amended judgment must be set forth on a separate document," subject to certain exceptions that are not applicable in this case. The Supreme Court has repeatedly made it clear that the "separate document" rule is a bright-line rule (although it may be waived by the parties), and that a party need not file a notice of appeal until the entry of a separate judgment in accordance with Rule 58(a). In *United States v. Indrelunas*, 411 U.S. 216, 220 (1973), the Court noted that:

> The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment. See Notes of Advisory Committee following Fed. Rule Civ. Proc. 58, reported in 28 U. S. C. Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. *See, e.g., United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a

> judgment was to be effective only when set forth on a separate document.

The Court expressly rejected the idea of taking a "case-by-case" approach to the separate document rule, holding that "[t]hat provision is . . . a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." *Id.* at 221-222.

Subsequently, in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978), the Court expressly held that "a party need not file a notice of appeal until a separate judgment has been filed and entered." The Court quoted the Advisory Committee notes from the 1963 amendments to Rule 58, stating that the amended rule "'requir[es] that there be a judgment set out on a separate document distinct from any opinion or memorandum which provides the basis for the entry of judgment.'" *Id.* at 385. The Court held that:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that *a party need not file a notice of appeal until a separate judgment has been filed and entered. See United States v. Indrelunas*, 411 U.S. 216, 220-222 (1973).

Mallis, 435 U.S. at 384-385 (emphasis added). The Court went on to state that:

> In *United States v. Indrelunas,* we recognized that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. *Id.,* at 221-222. *Technical application of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought.* –

Mallis, supra at 386 (emphasis added).

Thus, this Court clearly and unambiguously held that a party need not file a notice of appeal until a separate judgment has been entered under Rule 58. Prior to the panel's ruling in this case, lower courts, including the Eleventh Circuit, have consistently upheld this mandate. *See FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001) ("'A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document.'" (citation omitted)); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) (same); *Cooper v. Town of E. Hampton*, 83 F.3d 31, 34 (2d Cir. 1996) (same); *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1356 (11th Cir. 1994) ("The separate document requirement of Rule 58 is intended to provide a bright-line for litigants and courts to identify when the period for appeals begins. . . . The rule 'must be mechanically applied in order to avoid new uncertainties as to the date on which judgment is entered.'").

Although the Supreme Court in *Mallis* held that a party may always await the entry of a separate judgment before filing a notice of appeal, it recognized that the parties could waive the requirement of a separate judgment:

> *In United States v. Indrelunas,* we recognized that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. *Id.,* at 221-222. Technical application of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought. . . . The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered. As Professor Moore notes, if the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, "there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment." 9 J. Moore, Federal Practice P110.08 [2], p. 120 n. 7 (1970). *"[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." id.,* at 119-120.

Mallis, supra at 386 (emphasis added). Thus, although the Supreme Court held that no purpose would be served by dismissing an appeal of a final decision simply because the district court had not yet entered a separate judgment, it expressly held that parties "need not file a notice of appeal until a separate judgment has been filed and entered." In the present case, the notice of appeal was filed within the requisite period after the district court entered its Rule 58 judgment. Dismissal of the appeal is thus directly contrary to the Supreme Court's clear holding in *Mallis* and *Indrelunas.*

2. The panel decision establishes a new Eleventh Circuit rule.

Instead of considering Supreme Court authority directly on point, the Eleventh Circuit panel relied on dicta in prior Eleventh Circuit cases in reaching its decision. For apparently the first time, however, it applied such dicta to *dismiss* an appeal that was timely filed based on Supreme Court authority, rather than to uphold an appeal against an assertion that it was premature. Thus, the panel's ruling, and its denial of Relator's petition for en banc rehearing, constitutes the establishment of a new rule for the Eleventh Circuit, one that directly contradicts Supreme Court authority.

In *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442 (11th Cir. 1986), an Eleventh Circuit decision cited by the panel, the court did not address the applicability of the separate document rule. Indeed, Rule 58 is not even *mentioned* in *Schuurman*, much less analyzed. Nor does *Schuurman* discuss or even mention the Supreme Court's decisions in *Mallis* and *Indrelunas*. Rather, *Schuurman* dealt with when an order should be considered *final*, which is a completely different issue from Rule 58's requirement that a judgment be set forth on a separate document. *See Theriot v. ASW Well Service, Inc.*, 951 F.2d 84, 87 (5th Cir. 1992) ("Finality of a judgment, appealability of a judgment, and the separate document requirement are different concepts"). An order may well constitute a "final" decision, and yet not comply with Rule 58's requirement that judgment be entered as a separate document.[3] Indeed, if a district court issues an order dismissing

[3] The Supreme Court recognized this in *Mallis*, noting that a decision could be "final" for appeal purposes before the entry of a

(Continued on following page)

a complaint with prejudice, and providing *no* right of amendment, that is clearly a final decision, but it is emphatically *not* a separate judgment, and the appellant may await the entry of a separate judgment before filing his notice of appeal. *See Kent v. Baker*, 815 F.2d 1395, 1397 (11th Cir. 1987) (noting that dismissal order was not Rule 58 judgment, and that "The Supreme Court held that appellate courts must 'mechanically appl[y]' Rule 58 to protect a party from losing the right to appeal."); *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001) ("'A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document.'" (citation omitted)).

Moreover, the actual holding in *Schuurman* was to *affirm* the appellant's right to appeal under the facts of that case. The defendants argued that, because no final order of dismissal had been entered, the appeal was premature. Thus, the question in *Schuurman* was not whether the notice of appeal was too *late*, but whether it was too *early*. In rejecting the defendant's argument, the Court held that the order giving the plaintiff twenty days to file an amended complaint became final when the time for amendment expired, thus authorizing an appeal. The *holding* in that case – affirming the plaintiff's right to appeal – is thus perfectly consistent with the Supreme Court's holding in *Mallis* that a plaintiff may appeal an otherwise final decision without awaiting the formal entry of a separate judgment (although the plaintiff may always

---

separate Rule 58 judgment. *Mallis*, *supra* at 386 n. 7. Although the final decision would give the appellate court jurisdiction over an appeal, the appellant need not file his notice of appeal until the entry of the Rule 58 judgment.

await the entry of such separate judgment), and is consistent with this Court's statement that Rule 58 "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Mallis*, *supra* at 386. The panel's quite different application of that holding in this case, however, is directly contrary to the Supreme Court's holding in *Mallis* that "a party need not file a notice of appeal until a separate judgment has been filed and entered."

Because *Schuurman* did not purport to deal with the effect of Rule 58, or with the Supreme Court's clear holding that a party need not file a notice of appeal until the entry of a Rule 58 judgment, it did not constitute binding precedent on that issue. *See KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936) ("'The most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'"); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) (refusing to consider prior decision as controlling, because issue "was apparently not argued to the [prior] panel"); *see also Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1590, 140 L. Ed. 2d 759 (1998) ('there is, of course, an important difference between the holding in a case and the reasoning that supports that holding.'). *See also CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1227 (11th Cir. 2001) ("Even if that statement had been a holding of *DBB*, it would not bind us, because there is binding precedent of both this Court and the Supreme Court to the contrary.").

Similarly, *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001), the other case cited by the panel, did not constitute binding precedent requiring

dismissal of the appeal. In *FOGADE*, the Eleventh Circuit *upheld* the timeliness of a notice of appeal, noting that a Rule 58 judgment had not been entered following the order of dismissal. The Court relied upon the principle that "we mechanically apply Rule 58 to protect the right of appeal," and that "'[a] party safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document.'" *Id.* at 1285. In dicta in a footnote, the Court appeared to suggest that *Schuurman* adopted an "exception" to the Rule 58 requirement in certain circumstances not applicable to that case. *Id.* at 1286 n. 9. This statement was clearly dicta, as it was not addressed to the facts of that case. And as discussed above, this dicta was a mischaracterization of *Schuurman*, which did *not* in fact address Rule 58 at all. Thus, *FOGADE*'s characterization of *Schuurman* as creating an "exception" to Rule 58 was double-dicta with no binding force whatsoever. *See Dantzler v. United States IRS*, 183 F.3d 1247, 1252 (11th Cir. 1999) ("*Ford*'s unnecessarily broad interpretation of *Thomas*'s holding is not binding in this case, and it cannot change the dicta in *Thomas* to something more. *See United States v. Hunter*, 172 F.3d 1307, 1310 n. 1 (11th Cir. 1999) (Carnes, J., concurring) ('Two layers of dicta cannot do what one does not – bind a later panel.')"). Moreover, the idea that Rule 58 can be disregarded under certain circumstances is contrary to *Indrelunas*'s holding that there should not be "a case-by-case tailoring of the 'separate document' provision of Rule 58." *Indrelunas*, *supra* at 221.

Shorn of its dicta, the actual *holding* in *FOGADE* was a strong reaffirmation of the separate document rule, and the case expressly held that "'[a] party safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document.'" *FOGADE*, *supra* at

1285. *See also Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1356 (11th Cir. 1994) ("The separate document requirement of Rule 58 *is intended to provide* a bright-line for litigants and courts to identify when the period for appeals begins.... The rule 'must be mechanically applied in order to avoid new uncertainties as to the date on which judgment is entered.'"). Although the holding in *FOGADE* is consistent with Supreme Court authority, the dicta in footnote 9 is directly contrary to such authority.

The present case thus appears to be the first time that the Eleventh Circuit has dismissed an appeal based on the dicta set forth in *Schuurman* or *FOGADE* – neither of which cases even attempted to explain how such a result could be consistent with this Court's decisions in *Mallis* and *Indrelunas*. Thus, through a combination of improper reliance upon dicta in dissimilar cases and an apparent willful refusal to even acknowledge binding Supreme Court authority repeatedly cited by Relator, the Eleventh Circuit panel in this case has for the first time explicitly adopted a rule that directly contradicts this Court's prior decisions.

3. The panel failed to even address the conflict with Supreme Court authority.

Not only did the panel refuse to follow *Mallis* and *Indrelunas*, but it failed even to *mention* them in its decisions, although Relator extensively discussed them in his response to JCH's Motion to Dismiss and in his petition for en banc rehearing. The panel made no attempt whatsoever to distinguish *Indrelunas* or *Mallis*, to reconcile its decision with those cases, or even to acknowledge the existence of the Supreme Court authority. Rather, the

panel's initial one-paragraph order merely cited, without explanation, *Schuurman* and *FOGADE* – cases which themselves failed to discuss the contrary Supreme Court authority or to explain how the rule adopted in this case could be reconciled with such authority. [App. at 22-23]. Similarly, the panel's one-sentence denial of Relator's petition for rehearing again failed to acknowledge the conflict. [App. at 24]. If the decision of the panel is allowed to stand, this Court's unambiguous rulings will thus have effectively been overturned in the Eleventh Circuit, without benefit of any attempt to reconcile the new rule with this Court's holdings. The grant of certiorari and the reversal of the panel's decision is thus necessary to ensure that lower courts may not get around binding authority by simply ignoring it.

4. The panel opinion creates an inter-circuit conflict.

Not surprisingly, given this Court's unambiguous rulings to the contrary, the panel's decision in this case creates a conflict with other circuits that uphold this Court's rulings. In reliance on *Mallis* and *Indrelunas*, other circuits have routinely upheld this Court's mechanical application of Rule 58. *See In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) ("A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document."); *Cooper v. Town of E. Hampton*, 83 F.3d 31, 34 (2d Cir. 1996) (same). Indeed, prior to the ruling in this case, the Eleventh Circuit itself had always mechanically applied Rule 58 to preserve the right to appeal. *See Kent v. Baker*, 815 F.2d 1395, 1397 (11th Cir. 1987) (noting that dismissal order was not Rule 58 judgment, and that "The

Supreme Court held that appellate courts must 'mechanically appl[y]' Rule 58 to protect a party from losing the right to appeal."); *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001) ("'A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document.'" (citation omitted)).

Indeed, the Seventh Circuit has reached the precisely opposite conclusion under nearly identical facts. In *Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), the Seventh Circuit considered a situation where the district court dismissed a suit but gave the plaintiff a specified period of time for reinstatement. The Seventh Circuit held that, upon the expiration of that time, the decision became final, thus authorizing an appeal even in the absence of a Rule 58 judgment. *Id.* at 1165-66. Unlike the panel in this case, however, the Seventh Circuit in *Otis* expressly considered this Court's rulings in *Mallis* and *Indrelunas*, and upheld the principle that a party may always await the entry of a separate judgment before filing a notice of appeal. As the Seventh Circuit stated:

> These cases collectively safeguard the opportunity to appeal. If the loser appeals at once, the case proceeds without a pointless remand; if she waits until the formal judgment, she is secure against forfeiture. *Mallis* emphasized this element of *Indrelunas*. . . . "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document."

Otis, supra at 1167; *see also id.* ("The Supreme Court responded in *Indrelunas* with the holding that a party who waits for the separate judgment always is protected."). Thus, under the same essential facts as in the present

case, the Seventh Circuit recognized that, while a party need not await the entry of a separate judgment, it is always protected if it does so. Such a ruling is fully in keeping with this Court's holdings in *Mallis* and *Indrelunas*. The Eleventh Circuit's ruling in the present case, by contrast, is directly contrary to the Supreme Court's authority, and thus creates a conflict with those circuits, including the Seventh, that uphold such authority.

CONCLUSION

For the above reasons, the Court should grant a writ of certiorari to review the lower court's decision, or should summarily vacate or reverse the decision pursuant to Supreme Court Rule 16(1).

Respectfully submitted,

MIKE BOTHWELL
G. MARK SIMPSON
WILLIAM T. PRESCOTT*
BOTHWELL & SIMPSON, P.C.
304 Macy Drive
Roswell, Georgia 30076
(770) 643-1606

**Counsel of Record*
Counsel for Petitioner

APPENDIX

Page

1. 6/1/04 NDFL Order Granting Motion to Dismiss ..... App. 1
2. 8/26/04 NDFL Order Dismissing Case With Prejudice ..... App. 20
3. 8/31/04 NDFL Judgment ..... App. 21
4. 1/10/05 11th Circuit Court of Appeals Order Granting Motion to Dismiss ..... App. 22
5. 3/10/05 11th Circuit Court of Appeals Order Denying Motion for Reconsideration ..... App. 24

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF
AMERICA ex rel.
JOHN A. KING, D.O.,

Plaintiff,

v.

CASE NO.:
5:99-CV-73-SPM

JACKSON COUNTY
HOSPITAL CORPORATION,

Defendant. /

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

THIS MATTER has come before the Court upon the Plaintiff's First Amended Complaint (doc. 133), wherein the Plaintiff, John A. King, alleges that the Defendant Jackson County Hospital Corporation (JCH), has violated provisions of the False Claims Act (FGA). *See* 31 U.S.C. § 3729 *et seq.* The Defendants Motion to Dismiss (doc. 134), has responded to the Plaintiffs allegations by asserting several defenses, including that: 1) the Plaintiffs have failed to meet Federal Rule of Civil Procedure 9(b)'s particularity requirement, 2) the Plaintiff's complaint has failed to state a cause of action upon which relief may be granted and should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(6), and 3) JCH is not subject to the FCA, because, it is an arm of the state and consequently insulated from being sued in a federal district court. For the reasons set forth below the Court finds that the Defendant's Motion to Dismiss will be granted.

II. THE FALSE CLAIMS ACT

The FCA provides, in relevant part, that a defendant may be held liable if they have: 1) knowingly[1] presented or have caused to be presented to the federal government a false or fraudulent claim[2] for payment or approval, or 2) if they have knowingly caused to be made a false record or statement that allows a false or fraudulent claim to be paid by the federal government. 31 U.S.C. §§ 3729(a)(1)-(2). In order to establish a prima facie case under the FCA, a plaintiff is required to prove: "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001).

"The Act was first passed by Congress in 1863, at the request of president Lincoln, in an effort to combat profiteering by the Union Army suppliers during the Civil War." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-97 (11th Cir. 1991). An FCA action may either be brought by the Government under the auspices of the Attorney General, against the party alleged to have

---

[1] The use of the terms "knowing" and "knowingly" are applicable in those instances where the individual charged: "(1) has actual knowledge of the information; (2) acts in a deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)

[2] 31 U.S.C. § 3729(c) defines a "claim," in relevant part, as "any request or demand, whether under a contact or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States government any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

engaged in the fraudulent activity, *see* § 3730(a); or, as is the case in this matter, a private individual known as a Relator[3] may bring a civil cause of action, on behalf of both the Government and for themselves. § 3730(b)(1). This latter example is known as a *qui tam* action, which is defined as a cause of "action brought under a statute that allows a private person to sue for penalty, part of which the government or some other institution will receive." BLACK'S LAW DICTIONARY 1262 (7th ed. 1999). "The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring information forward "*Williams*, 931 F.2d at 1497 (citations and internal quotation omitted).

In an FCA action brought by a Relator, a copy of the complaint must first be served on the Government. The complaint shall remain under seal for a period of sixty days, during which time the Government may make a determination as to whether it will intervene. § 3730(b)(2). If the Government decides that intervention is appropriate,[4] it has primary responsibility for pursuing the matter. § 3730(c)(1). Alternatively, if the Government decides that it will decline to intervene in an action, the Relator may continue to pursue the action on his own. § 3730(c)(3).

The FCA has also established that in instances where the Government has decided to pursue an action, brought to its attention by a Relator, the Relator will receive,

---

[3] A Relator, is defined, in relevant part, as "[t]he real party in interest whose name a state or attorney general brings a lawsuit." BLACK'S LAW DICTIONARY 1292 (7th ed. 1999).

[4] The United States has declined to intervene in this matter.

depending on the extent of the individual's contribution, between 15 and 25 percent of the proceeds of the action or settlement of the claim," as well as reasonably incurred expenses. § 3730(d)(1). If, in turn, a determination is made by the Government not to proceed with a particular claim, and the Relator pursues the matter on his own, he or she is entitled to receive an amount in damages that a court deems reasonable, ranging between 25 and 30 percent "of the proceeds of the action or settlement and shall be paid out of such proceeds," as well as other reasonable costs including attorney's fees. § 3730(d)(2).

III. FACTUAL BACKGROUND

The Plaintiff-Relator has brought this *qui tam* action, on behalf of both himself and the United States, contending that the Defendant, JCH, has violated the FCA by knowingly submitting false claims for Medicare or Medicaid. Plaintiff's First Amended Complaint, ¶ 1. The Plaintiff, is an orthopaedic surgeon and anesthesiologist, who has worked for JCH since October of 1997. *Id.* at ¶ 6. While in his professional capacity, the Plaintiff alleges that he has become acquainted with the Defendant's business and billing practices, asserting that they contravene the FCA. *Id.* The Plaintiff alleges that JCH is involved in three separate schemes: 1) JCH routinely waived requiring payment of deductibles; 2) JCH improperly charged for equipment it was not licensed to supply; and 3) JCH allowed its employees to fill out fraudulent timecards.

A. Waiver of Copayments

The Office of the Inspector General of the Department of Health and Human Services has issued a Special Fraud Alert putting the health care industry on notice regarding potentially fraudulent billing procedures being engaged in by Medicare and Medicaid providers, specifically the practice of waiving the payment of Medicare deductibles. *Id.* at ¶¶ 14-16. The Plaintiff alleges that JCH routinely waived requiring Medicare and Medicaid patients to pay deductibles, wherein JCH would offer a 10% discount to all patients, including those receiving Medicare and Medicaid, who paid their entire bill within 30 days. *Id.* at ¶18. The Plaintiff avers that "the discount was only offered after bills had been submitted to any private or government insurer, and only on the portion of the bill for which the patient himself or herself was liable." *Id.*

The Plaintiff alleges that JCH's practice of waiving copayment of deductibles has led to Medicare and Medicaid being billed at a higher rate, by falsely stating JCH's actual charges. *Id.* at ¶20. The Plaintiff maintains that the discounts were not offered until after JCH had submitted bills to insurance companies, therefore the federal government was never made aware of JCH's "discount program," and according to the Plaintiff, "all Medicare and Medicaid claims submitted by JCH pursuant to the discount program constitute false claims." *Id.*

B. Improperly Charging for Equipment JCH was not Licensed to Supply

Secondarily, the Plaintiff alleges that the Defendant, though not a licensed supplier of Durable Medical Equipment (DME), would "bill Medicare or Medicaid for items of

DME," *Id.* at ¶22. Moreover, physicians who were affiliated with the Defendant would, according to the Defendant, "routinely send individuals to JCH with a prescription for items of DME," *Id.*, and as such, "[t]his practice resulted in the submission of numerous false Medicare and Medicaid claims" including, *inter alia*, "billing for a medically unnecessary emergency room visit." *Id.* at ¶ 26. Moreover, by including the costs of improperly prescribed DME in the JCH annual cost reports "improperly inflated [the Defendant's] costs, thus resulting in higher future reimbursement levels for Medicare and Medicaid." *Id.*

C. Permitting Employees to Submit False Time Cards

Finally, the Plaintiff charges that the Defendant "increased billings for anesthesia services by falsely reporting modifiers to anesthesia services provided Medicare and Medicaid beneficiaries." *Id.* at ¶ 27. The Plaintiff, became aware that the employees of JCH would: 1) bill procedures as lasting one hour, when in actuality the particular procedure would often last no longer than 15 minutes, 2) falsely classify regional anesthesia encounters as general ones, 3) falsely charge for technical equipment that was not related to the anesthesia encounter, 4) falsely bill in one hour increments in contravention of Medicare billing provisions. *Id.*

The Plaintiff also asserts that he has been made aware of nurses, working within JCH, who have falsified time cards, whereby supervisors would sign off on time sheets indicating that individual nurses worked one hour, when truly the nurses had only spent "15 minutes or less

of nurse time." *Id.* at ¶28. Additionally, according the Plaintiff, nurses "would routinely add on anesthesia time to the recovery room" in order to inflate anesthesia fees, and operating room nurses were permitted to falsely represent travel time in instances where there was "no travel time attributable to their operating-room procedures." *Id.* The Plaintiff-Relator maintains that JCH countenanced this conduct, which resulted in "inflate[d] payments for patient services," and ultimately led to the submission of false claims for payment to Medicare and Medicaid. *Id.* at ¶29.

IV. ANALYSIS

The Court begins its analysis by noting that since this matter comes before the undersigned on a motion to dismiss, the complaint "must be construed in a light most favorable to the [P]laintiff and the factual allegations must be taken as true." *Brooks v. Blue Cross Blue Shield of Florida*, 116 F.3d 1364, 1369 (11th Cir. 1997). With this understanding, the Court must first outline the Eleventh Circuit's "particularity requirement" for fraud actions, and how this pleading standard affects claims brought under the FCA. Next, the Court must analyze the Defendant's complaint to determine whether it complies with Eleventh Circuit's standard. Thereafter, the Court must then determine whether the allegations, as pled in the complaint, constitute an actionable claim under the FCA. Finally, the Court will determine whether JCH is an "arm" of the state, thus preventing the hospital from being sued in federal district court.

A. The FCA's Particularity Requirement

Federal Rule Of Civil Procedure 9(b) provides in relevant part that, "[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with *particularity.*" (emphasis added). Generally speaking, the particularity requirement referenced in Rule 9(b) is designed to give a defendant notice as to the precise nature of the allegations of fraud being brought against them; and in addition, is intended to insulate defendants from claims that are wholly without merit, by insisting on precision. *Brooks v. Blue Cross and Blue Shield of Fla*, 116 F.3d 1364, 1370-71 (11th Cir. 1997); *see also United States v. Baxter International, Inc.*, 345 F.3d 866, 883 (11th Cir. 2003) ("Where Rule 9 is implicated the plaintiffs must plead not only the general nature of their injuries but also the specifics of how and when they were injured."). Consequently, the Eleventh Circuit has observed that a party alleging fraud, may withstand a motion to dismiss a complaint on Rule 9(b) grounds if the complaint indicates:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of the omission, not making) same, and (3) the content of the statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Brooks, 116 F.3d at 1371. (citation and quotation omitted).

The Eleventh Circuit has also specifically confronted Rule 9(b)'s applicability to claims brought under the FCA, and has made it clear that a "plaintiff's complaint must allege the details of the defendant's allegedly fraudulent

acts, *when* they occurred, and *who* engaged in them." *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994) (emphasis added). Principally, one is liable under the FCA if they have knowingly presented a false claim for payment to the federal government. *United States ex rel Clausen v. Laboratory Corp. of America. Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). Thus, regardless of the degree of impropriety a defendant is engaged in, under the FCA there is no actionable claim unless the knowing submission of a fraudulent claim results from the defendant's actions. *Id.* Moreover, a plaintiff may not rely on generalized assertions of fraud, and therefore, consistent with Rule 9(b)'s understanding, the complaint must have "some indicia of reliability . . . to support the allegation of *an actual false claim* for payment being made to the Government" *Id.* (emphasis in the original).

The Plaintiff has directed the undersigned's attention to an unpublished opinion rendered by an Eleventh Circuit panel which articulates a seemingly more permissive pleading standard under Rule 9(b), when information concerning potentially fraudulent activity is within the exclusive possession of the entity being sued. *See United States ex rel. Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936 (11th Cir. (Ga.) August 15, 2003)). The Court notes that this proposition has never been doubted in the context of a fraud action. *See, e.g., ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002); *Divittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). However, "[t]his relaxed standard does not obviate the duty of the plaintiff to fully plead fraud allegations." *United States ex rel. Butler v. Magellan Health Services*, 101 F.Supp.2d 1365, 1369 (M.D.Fla. 2000) (citing

Anthony Distributors, Inc. v. Miller Brewing Co., 904 F.Supp 1363, 1366 (M.D.Fla. 1995)).[5]

B. Does the Plaintiff's Complaint Satisfy Rule 9(b)'s Requirements?

1.

The Plaintiff's complaint outlines a series of apparently fraudulent schemes engaged in by JCH and its employees. The Court will simultaneously address, albeit briefly, two of the schemes alleged to have occurred: 1) the submission of fraudulent DME bills to Medicaid and Medicare, and 2) the submission of fraudulent time-cards by nurses employed by the Defendant. The Defendant has attached a memorandum sent out by Ruth Pascu, Patient Account Director for JCH, dated October 30, 1998. *See* Plaintiff's Complaint, Exhibit B. The memorandum notes that "Jackson Hospital is not a licensed DME vendor and therefore cannot bill for DME items. Your patient must be treated as an emergency room patient in order for us to fill your prescription." The implication from this memorandum is that JCH personnel were improperly billing for DME items. This claim, as presented, is inadequate because while it may indeed suggest that fraudulent activity was countenanced by JCH, the "Plaintiff pleads no *specific* occurrences of a false claim." *Butler*, 101 F.Supp.2d at 1369 (emphasis added).

---

[5] The Court would also note that the degree of particularity provided by the relator in *Hill*, specifically as it related to time, content, and who engaged in the fraudulent conduct, far exceeded the particularity found in relator's complaint in *Clausen*, which that court found failed to meet Rule 9(b)'s minimal pleading requirements. 290 F.3d at 1315.

Moreover, the Plaintiff's allegation that JCH was permitting its employees to submit fraudulent time-cards also provides scant detail beyond describing the general nature of the scheme. Accordingly, without more in the way of detail, neither of these two schemes discussed in the Plaintiff's complaint satisfies Rule 9(b)'s particularity requirement, because the claims fail to identify with any specificity, when the fraudulent acts occurred, who engaged in such conduct, and if any false claims were submitted for payment. *See e.g.*, *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d at 568; *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993) (observing that a minimum, Rule 9(b) requires a plaintiff to "allege the time, place, and content of the alleged misrepresentation").

2.

A slightly more difficult question involves whether the Defendant's policy of allowing patients, including those receiving Medicare, to waive a percentage of their deductible if fully paid within thirty days of receiving their bill presents an actionable claim under the FCA. The Court finds that as it pertains to this allegation, the Plaintiff has provided sufficient detail to overcome Rule 9(b). Nevertheless, satisfying this pleading burden is of little consequence if the Plaintiff presents no violation of law.

The Plaintiff has affixed a copy of a bill, sent to a patient who had been treated by JCH outlining the Defendant's policy, dated November 29, 1998. *See* Plaintiff's Complaint, Exhibit A. ("A 10% PROMPT PAY DISCOUNT is offered on patient liability (self pay, deductibles and co-payments) if paid in full within 30 days of the date of this

statement."). The bill shows that Medicare paid approximately 98 percent, or $36,004.35, of the patient's $36,768.35 medical bill, and the remainder, $764, was to be paid by the patient. According to the billing statement, the Defendant offered the patient a 10 percent discount if the bill was fully paid within 30 days. The Plaintiff argues that this policy constitutes an impermissible inducement to do business with JCH.

The Department of Health and Human Services, the agency which oversees Medicare, has previously attempted to address potential impropriety related to Medicare provider copayment plans, with incentives similar to those offered by the Defendant such as providing services at reduced prices. In an effort to stem continuing problems associated with Medicare, the Department of Heath and Human Services' Office of the Inspector General (OIG) has issued a series of Special Fraud Alerts. *See* Department of Health and Human Services Publication of OIG Special Fraud Alerts, 59 Fed.Reg. 65,372 (December 19, 1994). A Special Fraud Alert issued in May of 1991, indicated that the OIG was actively investigating "charged-based" health care providers, practitioners and suppliers of health care items who routinely waived Medicare copayments and deductibles, which the OIG maintained, was potentially actionable under the Medicare Anti-Kickback Statute. *See*, *e.g.*, 42 U.S.C. § 1320a-7b(b)(1)(B) ("whoever knowingly and willfully solicits or receives any remuneration . . . in return for purchasing . . . any good, facility, service or item for which payment may be made in whole or in part to [Medicare] shall be guilty of a felony"). The OIG noted that routinely waiving "deductibles and copayments by charge based providers practitioners or suppliers is unlawful because it results in (1) false claims, (2) violations of the

anti-kickback statute, and (3) excessive utilization of items and services paid for by Medicare." 59 Fed.Reg. 65,372 at 5. The OIG described a potential factual scenario outlining the importance of combating routine waivers of deductibles and copayments, stating,

> A provider, practitioner or supplier who routinely waives Medicare copayments or deductibles is misstating its actual charge. For example, if a supplier claims that its charge for a piece of equipment is $100, but routinely waives a copayment, the actual charge is $80. Medicare should be paying 80 percent of $80 (or $64), rather than 80 percent of $100 (or $80). As a result the supplier's misrepresentation, the Medicare program is paying $16 more than it should for an item.

Id. at 6. The fraud alert provided a non-exhaustive list of examples which might indicate improper waiver of deductibles and copayments, including, *inter alia,* "[a]dvertisements which promise that 'discounts' will be given to Medicare beneficiaries." *Id.* at 7.

The Plaintiff contends that the claims raised in his complaint comport with the concerns expressed in the OIG's Special Fraud Alert, and thus, dismissal of this action is not appropriate. However, an entity's business practices that are seemingly inconsistent with an administrative regulation do not necessarily constitute fraud pursuant to the FCA. *See United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."). The Seventh Circuit has observed, "the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The

FCA is a fraud prevention statute; violations of [an administrative agency's] regulations are not fraud unless the violator *knowingly lies* to the government about them." *United States ex rel. Lamers v. City of Green Bay,* 168 F.3d 1013, 1020 (7th Cir. 1999) (emphasis added); *see also X Corp. v. Doe.* 816 F.Supp. 1086, 1093 (E.D.Va. 1993) ("The heart of fraud is an intentional misrepresentation. A violation of a regulatory provisions, in absence of a knowingly false or misleading representation, does not amount to fraud."), *aff'd*, 17 F.3d 1435 (4th Cir. 1994) (table).

Because, "[t]he requisite intent [under the FCA] is the knowing presentation of what is known to be false," *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1421 (9th. Cir. 1991), the Court finds that there has clearly been no indication that the Defendant *knowingly* presented a false claim for payment in the above-styled matter. *See, e.g., Wang v. FMC Corp,* 975 F.2d 1412, 1420 (9th Cir. 1992) ("[o]ne violates the [FCA] if one has 'actual knowledge' that one is submitting a false or fraudulent claim for payment or approval").[6] The Court further notes that it is likely that the Defendant's payment incentive program has only taken advantage of an open legal question, but, that is neither "deliberately ignorant nor recklessly disregardful" so as to be actionable under the FCA. *Hagood,* 929 F.2d at 1421; *see also United States of America ex rel. Barrett, et al. v. Columbia/HCA Healthcare Corp. et al.*, 251 F.Supp.2d 28, 35 (D.D.C. 2003) ("Relators have not shown that waiver of co-pay is a

[6] This should not be taken to imply that at this stage of the litigation, the Plaintiff must prove his claims. *Clausen*, 290 F.3d at 1313 ("When Rule 9(b) applies to a complaint, a plaintiff is not expected to actually *prove* his allegations. . . .").

violation that rises to the level affecting the government's decision to pay, such as by citing to an applicable statute or regulation."). This is simply because "[t]he [FCA] does not create liability merely for a health care providers disregard of Government regulations or internal policies, unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 381 (5th Cir. 2003).

Indeed, several federal appellate courts have also held "that a claim under the [FCA] is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) (citing *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C.Cir. 2000)) (omitting citations to Fourth, Fifth, and Ninth Circuit cases holding similarly). In *Mikes*, the Second Circuit was confronted with a relator who asserted that a group of doctors falsely submitted claims for payment in violation of the FCA, by failing to "properly" calibrate certain diagnostic equipment, and failing to supervise the administration of the diagnostic tests, consequently rendering the test results uncertain, and leading to the submission of "false" claims to the Government. *Id.* at 693-96. The *Mikes* court analyzed the relators claims under, *inter alia*, two separate legal theories: 1) express false certification, and 2) implied false certification. An express false certification, "falsely certifies compliance with a particular statute, regulation or contract term, where compliance is a *prerequisite* to payment." *Id.* at 697-98 (emphasis added). Similarly, one is liable under the implied false certification theory "when the underlying statute or regulation upon which the plaintiff relies

expressly states the provider must comply in order to be paid." *Id.* at 700 (emphasis in the original). The Second Circuit found that neither certification theory provided an actionable grounds for relief.

As was found in *Mikes,* the relator in the above-styled matter has not asserted that Medicare's reimbursement of JCH, in this instance, was premised on any such explicit, or implicit, certification policy. Additionally, the Eleventh Circuit has observed that failure to absolutely adhere to an agencies regulations will not summarily result in an actionable FCA claim, unless as a consequence the Government is compelled to pay for that which it is not responsible for. *See Clausen,* 290 F.3d at 1311. Therefore, this claim must fail.

C. Is JCH an "arm" of the state?

1. Background

The Supreme Court has held that a state agency may not be sued under the FCA, *see Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 120 S.Ct. 1858 (2000), whereas local governments and municipalities may be held liable under the statute. *Cook County, Illinois v. United States ex rel. Chandler,* 538 U.S. 119, 123 S.Ct. 1239 (2003). The Eleventh Circuit has held that a determination as to whether an entity is immune from suit under the Eleventh Amendment, requires analyzing: "(1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Miccosukee Tribe of Indians of Florida v. Florida State Athletic Commission,* 26 F.3d 1226, 1231 (11th Cir. 2000).

2. *Discussion*

a. *How does state law define JCH?*

The answer to this is provided in bill enacted by the Florida Legislature, Chapter 2003-363 (Act). The Act provides that it was the intent of the Legislature to create the Jackson County Hospital District, a public, non-profit independent special district, designed to attend to the medical needs of those in the surrounding area. *See* 2003-363(2) ("Purpose of District").

b. *What degree of control does the state possess?*

The affairs of JCH are controlled by a nine member board of trustees, all of whom are appointed by the Governor. *See* 2003-363(3)(1) ("Membership and organization of the governing board of the district"). The board's responsibilities include providing "for the operation and maintenance of all health care facilities, owned operated, or maintained by the District," 2003-363(4)(3), and the hiring and firing of personnel. *Id.*

c. *Where does the entity derive its funds?*

The Act provides that the Board of County Commissioners of Jackson County are responsible for "providing revenue for the erection, building, equipping, and maintenance and operation of" JCH, and thereafter, these revenues are to be turned over to JCH's trustees. 2003-363(5)(1) ("Authorization for Jackson County Board of County Commissioners to fund hospitals; source of funds").

d. Who is responsible for judgements against the entity?

The members of the board have the capacity to sue "to sue and be sued under the name of Jackson County Hospital District, without waiving any privilege or immunity of section 768.28." 2003-363(4)(2)(a) ("Powers of the District and its governing body").

3. Conclusion

Perhaps the singularly most important consideration in any Eleventh Amendment inquiry is who has primary financial responsibility if the entity in question is found liable by a court of law? The Eleventh Circuit has noted that "Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' must under *all* circumstances, be paid out of state funds." *Travelers Indemnity Co. v. School Board of Dade County, Florida,* 666 F.2d 505, 509 (11th Cir. 1982) (emphasis added). The Supreme Court has similarly found that the dispositive question in determining whether an political subdivision is immune under the Eleventh Amendment, is whether the state shall be exclusively responsible for the entity's expenditures, including debts incurred; because if not, the Eleventh Amendment will not be implicated. *See Hess v. Port Authority Trans-Hudson Co.,* 513 U.S. 30, 48, 115 S.Ct. 394, 404 (1994). A review of the JCH's enabling statute, underscores that the Board of County Commissioners of Jackson County will have responsibility for providing the financing for JCH, not the State of Florida. Therefore the Court holds that JCH is simply not an extension of the State, and for the purpose of this action, JCH may be sued under the FCA. *See Cook*

County, Illinois v. United States ex rel. Chandler, supra. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant Jackson County Hospital Corporation's Motion to Dismiss Relators First Amended Complaint (doc. 134) is GRANTED without prejudice as it relates to the Plaintiff-Relator.

2. The Government has declined to intervene in this matter, therefore, as it pertains to the United States, the granting of Defendant Jackson County Hospital Corporation's Motion to Dismiss Relators First Amended Complaint (doc. 134) is also without prejudice.

3. The Plaintiff-Relator will be permitted a final opportunity to amend his complaint, and will be given twenty days from the date of this order to file an amended complaint with the Clerk of Court

SO ORDERED this 1st day of June, 2004.

s/ Stephan P. Mickle
Stephan P. Mickle
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA ex rel. JOHN KING, D.O.,

Plaintiff,

vs. **5:99-CV-073-SPM**

JACKSON COUNTY HOSPITAL CORPORATION,

Defendant. /

ORDER DISMISSING CASE WITH PREJUDICE

THIS CAUSE comes *sua sponte* before the Court. Pursuant to this Court's order rendered June 1, 2004 (doc. 145), the Plaintiff-Relator was permitted a final opportunity to amend his complaint within twenty days. No amended complaint has been filed to date. Accordingly, it is

ORDERED AND ADJUDGED that this action is *dismissed with prejudice.*

DONE AND ORDERED this *twenty-sixth* day of August, 2004.

s/ Stephan P. Mickle
Stephan P. Mickle
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF
AMERICA ex rel.
JOHN KING, D.O.

VS

JACKSON COUNTY
HOSPITAL CORPORATION

CASE NO.
5:99CV073 SPM

JUDGMENT

This action came before the Court with the Honorable Stephan P. Mickle presiding. The issues have been heard and a decision has been rendered.

Judgment is entered in favor of defendants, JACKSON COUNTY HOSPITAL CORPORATION and against plaintiffs, UNITED STATES OF AMERICA ex rel. JOHN KING, D.O. dismissing this case with prejudice. Costs and fees are allowed as provided by law.

WILLIAM M. McCOOL,
CLERK OF COURT

August 31, 2004
DATE

s/ Adelita Tinaya-Miller
Deputy Clerk: Adelita Tinaya-Miller

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15178-BB

JOHN A. KING,

Plaintiff-Appellant,

versus

JACKSON COUNTY HOSPITAL INC. of MARIANNA, FLORIDA, QUORUM HEALTH RESOURCES, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Jan. 10, 2005)

Before CARNES, BARKETT, and MARCUS, Circuit Judges.

BY THE COURT:

The Appellee's motion to dismiss is GRANTED, and the appeal is DISMISSED for lack of jurisdiction. Since the appeal period began upon the expiration of the time given by the district court for Appellant to amend his complaint, or June 22, 2004, it expired on July 22, 2004. Appellant's October 4, 2004, notice of appeal is untimely to appeal the June 2, 2004, district court order. Fed.R.App.P. 4(a)(1)(A); *see Fogade v. ENB Revocable Trust,* 263 F.3d

1274, 1286 n.9 (11th Cir. 2001); *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442, 445 (11th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15178-BB

JOHN A. KING,

Plaintiff-Appellant,

versus

JACKSON COUNTY HOSPITAL INC.
of MARIANNA, FLORIDA, QUORUM
HEALTH RESOURCES, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Mar. 10, 2005)

Before CARNES, BARKETT, and MARCUS, Circuit Judges.

BY THE COURT:

Appellants' motion for rehearing *en banc,* which we construe as a motion for reconsideration of our January 10, 2005, order dismissing this appeal for lack of jurisdiction, is DENIED.

---

(2)

No. 04-1658

Supreme Court, U.S.
FILED
AUG 5 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* JOHN A. KING,

Petitioner,

v.

JACKSON COUNTY HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JOHN BERANEK
Counsel of Record
MICHAEL J. GLAZER
AUSLEY & MCMULLEN
Post Office Box 391
227 South Calhoun Street
Tallahassee, Florida 32302
(850) 224-9115

Attorneys for Respondent

195856

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in dismissing Petitioner's appeal for lack of jurisdiction due to Petitioner's failure to timely file a notice of appeal.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statutory Provisions and Rules Involved	1
Statement of the Case	4
Reasons for Denying the Petition	7
1. The decision of the Eleventh Circuit is not directly contrary to binding precedent of this Court.	10
2. Nor does inter-circuit conflict justify granting the Petition for Writ of Certiorari.	16
3. The decision of the Eleventh Circuit is not otherwise improper.	20
Conclusion	25

TABLE OF CITED AUTHORITIES

Page

Cases:

Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.,
479 U.S. 966 (1986) 9, 16

Bankers Trust Co. v. Mallis,
435 U.S. 381 (1978) ..... *passim*

Beaulieu v. United States,
497 U.S. 1038 (1990) 9, 20

Browder v. Director, Dept. of Corrections of Illinois,
434 U.S. 257 (1978) 23

Brown Transport Corp. v. Atcon, Inc.,
439 U.S. 1014 (1978) 9

Cook County, Illinois
v. United States ex rel. Chandler,
538 U.S. 119 (2003) 4

Excel Communications, Inc. v. AT&T Corp.,
528 U.S. 946 (1999) 8

Fogade v. ENB Revocable Trust,
263 F.3d 1274 (11th Cir. 2001) 10, 12, 19, 20, 21

Hertz Corp. v. Alamo Rent-A-Car, Inc.,
16 F.3d 1126 (11th Cir. 1994) 11, 12, 13, 18, 19

Lackey v. Texas,
514 U.S. 1045 (1995) 8

Cited Authorities

Page

Layne Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 8, 19

Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912 (1950) 9

Morris v. City of Hobart,
39 F.3d 1105 (10th Cir. 1994) 16

Otis v. City of Chicago,
29 F.3d 1159 (7th Cir. 1994) 16, 17, 18, 19, 24

Schuurman v. Motor Vessel "Betty K V",
798 F.2d 442 (11th Cir. 1986) ..... *passim*

Shapiro v. UJB Financial Corp.,
964 F.2d 272 (3d Cir. 1992) 17

Singleton et ux. v. Commissioner of Internal Revenue,
439 U.S. 940 (1978) 8

United States v. Indrelunas,
411 U.S. 216 (1973) ..... *passim*

Statutes:

28 U.S.C. § 1291 ..... 1, 13, 17

28 U.S.C. § 2107(a) ..... *passim*

Cited Authorities

Page

Rules:

Federal Rule of Civil Procedure 9(b) 5

Federal Rule of Civil Procedure 12(b)(6) 5

Federal Rule of Civil Procedure 54(a) 2, 13

Federal Rule of Civil Procedure 58(a) ... 2, 15, 16, 18, 21

Federal Rule of Appellate Procedure 4(a) 11, 23

Federal Rule of Appellate Procedure 4(a)(1)(A) .. 3, 6, 14

TABLE OF APPENDICES

Page

Appendix A — Notice Of Appeal Filed By Petitioner With District Court On September 28, 2004 .... 1a

Appendix B — Motion Of The United States For Extension Of Time Within Which To File Brief As Amicus Curiae In Support Of Affirmance Filed December 28, 2004 ..... 3a

Respondent, Jackson County Hospital Corporation, respectfully submits this Brief in Opposition to the Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by John A. King, D.O. in this case.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals at issue is not reported, but was included in the Appendix to the Petition for Certiorari at page 22. Other relevant unreported orders and opinions of the lower courts in this case are included either in the appendix to the Petition for Certiorari ("Pet. Appx.") or the appendix to this Brief in Opposition ("Resp. Appx.").

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1291 reads:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 2107(a) reads:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or

decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

Federal Rule of Civil Procedure 54(a) reads:

(a) Definition; Form.

"Judgment" as used in these rules includes a decree and any order from which an appeal lies.

Federal Rule of Civil Procedure 58(a) reads:

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document in not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

Federal Rule of Appellate Procedure 4(a)(1)(A) reads:

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

STATEMENT OF THE CASE

Petitioner, John A. King ("King" or "Petitioner") originally filed this *qui tam* action on March 17, 1999, against Respondent, Jackson County Hospital Corporation ("JCHC" or "Respondent") and Quorum Health Resources, L.L.C. ("Quorum") on behalf of himself and the United States Government pursuant to the False Claims Act, 31 U.S.C. § 3730. The U.S. Government declined to intervene in the action. However, in the proceedings below in the Eleventh Circuit Court of Appeals, the U.S. Government gave notice of its intention to oppose the appeal by King to the Eleventh Circuit.

On August 17, 2001, the United States District Court for the Northern District of Florida dismissed King's complaint in its entirety against JCHC with prejudice on the grounds that because JCHC was a government entity, it was not a "person" subject to liability under the FCA. The complaint was also dismissed as it related to Quorum for failure to allege fraud with particularity, but King was given leave to amend the complaint against Quorum. However, King did not file an amended complaint against Quorum, and Quorum was voluntarily dismissed by King with prejudice from the case.

King appealed the dismissal of the case against JCHC to the Eleventh Circuit Court of Appeals, but during the pendency of the appeal, this Court decided the case of *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003), in which the Court overruled prior case law and held that the term "person" in the FCA was not intended to exclude local government entities. As a result, and with the agreement of JCHC, on April 3, 2003, the Eleventh Circuit vacated the dismissal of King's action against JCHC and remanded the case for further proceedings in light of the *Chandler* opinion.

On remand, King filed a one-count First Amended Complaint against JCHC alleging that JCHC violated the False Claims Act. The First Amended Complaint was again dismissed, the bulk of its allegations being dismissed for failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b), the remainder being dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In its dismissal order dated June 1, 2004, the district court specifically informed King of the flaws in the First Amended Complaint (many of which existed in the original Complaint), and granted King "twenty days from the date of this order to file an amended complaint with the Clerk of Court[.]" The order also informed King that the twenty day period was "a final opportunity to amend his complaint[.]" (Pet. Appx. at 19.) The twenty day period expired on June 21, 2004.

Thereafter, notwithstanding express guidance and instruction from the court, King failed to file an amended complaint or any other paper by June 21, 2004, and did not file a notice of appeal by July 21, 2004, which was 30 days from when the dismissal order became effective and final. Notwithstanding the finality of the court's prior order, on August 26, 2004, the district court, *sua sponte*, entered a further order dismissing the "action" with prejudice. (Pet. Appx. at 20.) Again, no notice of appeal was filed within 30 days despite the fact that this August 26 order left no doubt that the entire action had been dismissed with prejudice. A judgment by the clerk was entered in favor of JCHC and against the United States and John King on August 31, 2004. (Pet. Appx. at 21.) King filed a Notice of Appeal on September 28, 2004 (Resp. Appx. at 1), 99 days after the dismissal order of the district court became final by the expiration of the time given for amendment.